In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Reply Brief for the Appellants

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Introduction

Appellants Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, and the Commonwealth's District Attorneys submit this reply brief to respond to several arguments contained in the briefs of appellees Baird, et al. (Baird), and Planned Parenthood League of Massachusetts, et al. (Planned Parenthood); to correct certain misstatements

found in appellees' briefs; and to object to attempts to enlarge the evidentiary record. These responses are not lengthy, but the Attorney General considers them sufficiently important to warrant the Court's attention prior to oral argument. The brief concludes with appellants' description of the constitutional glass through which they suggest the Court view the controversy now displayed before it.

Argument

I. APPELLEES INCORRECTLY ANALYZE THE STATUS OF THEIR CLAIMS CONCERNING IMMATURE MINORS AND INCORRECTLY STATE THE LAW GOVERNING A MINOR'S CONSENT TO THE PROVISION OF HEALTH CARE SERVICES IN MASSACHUSETTS.

A. *The Record Establishes that Defendants Raised the Immature Minor Issue Early in the District Court Proceedings and that Plaintiffs Waived Any Claims They Might Have Made on Behalf of Immature Minors.*

Appellants have previously argued that a facial attack on the statute is improper because only the claims of mature minors were before the District Court and because plaintiffs explicitly waived in writing any claims they might have asserted on behalf of immature minors. Brief for the Appellants at 51-52. Despite the record and despite unequivocal waiver, both sets of appellees attempt to interpret the proceedings in the District Court in a manner which would permit them to support the District Court's conclusions concerning immature minors. Such legerdemain has no place in constitutional adjudication.

Baird argues that appellants "failed to inquire about Plaintiffs' position on immature minors until the last day of the second trial . . .." Baird's brief at 39. Passing the observation that it is not a defendant's obligation to assist a plaintiff in conceptualizing and presenting his case, see 2 App. 472 (remarks of Julian, S.D.J.), this characterization of the record is inaccurate. The Attorney General first brought the immature minor issue to the District Court's attention, and, presumably, the plaintiffs' as well, in April of 1977, more than six months before the second trial began. See Defendants' Initial Statement of Disputed Material Facts, 1 App. 128-29. In the course of discovery, defendants frequently emphasized their interest in information concerning immature minors. See, e.g., Defendants' First Set of Requests for Admissions to Plaintiff Gerald Zupnick, 1 App. 154, 155, 165-68; Deposition of Carol C. Nadelson, 2 App. 489, 515-19. As a result, plaintiffs had a substantial opportunity to formulate their position concerning the claims of immature minors, and the written communications of plaintiffs' counsel with counsel for the defendants state what purports to be a well-established position fairly emphatically. 1 App. 417-18; 423-24; 426. How appellees can, on this record and in light of the assertion in their brief that they "have consistently approached [the statute] as including only mature minors within its scope . . .," Baird's brief at 38, also suggest that appellants "should be precluded by their own tardiness" from arguing this issue, *id.* at 39-40, eludes appellants' comprehension.

Planned Parenthood attempts to respond to the problem of immature minors in a more sophisticated, but equally unsatisfactory, manner. Planned Parenthood appears to argue that plaintiffs did not waive any claims in the District Court because counsel expressed an "intention" not to do so. Planned Parenthood's brief at 74, n. 71. Admittedly, at the conclusion of the second trial counsel did reserve his right to argue the

claims of immature minors. 2 App. 472, 475. But it is equally true, as just discussed, that counsel subsequently *did* expressly waive these claims. Planned Parenthood's footnote in its brief on this point, at 74, n. 71, by omitting reference to counsel's subsequent and dispositive actions, is simply misleading.[1]

In sum, no immature minors were actually before the District Court, and no person before the court properly asserted claims or adduced evidence on their behalf (with the possible exception of the dual consent issue). Moreover, to whatever limited extent immature minors were represented before the District Court, plaintiffs' counsel explicitly waived their claims. 1 App. 426. As a result, this Court should conclude that the District Court erred in sustaining plaintiffs' facial attack.

B. *Appellees' Various Formulations of the Commonwealth's Statutory and Common Law Mature Minor Rules Are Inaccurate.*

Inexplicably, appellees disagree among themselves and with appellants over the ability of an unmarried minor, male or female, to consent to the provision of health care services in Massachusetts without parental consent. In the Attorney General's

[1] Planned Parenthood also argues that, because the District Court determined in *Baird III* that the interests of immature minors were within the scope of the class represented by Gerald Zupnick (Planned Parenthood's brief at 75; *Baird III* at 1001, n. 6), these interests were before the court for all purposes from the commencement of the action. But the District Court never authorized Zupnick to assume such a responsibility. Rather, in passing upon his standing and certifying him as a class representative, the court held merely that he had "standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents. . . ." *Baird I* at 852. This limited and technical acceptance of Zupnick as a class representative should not be considered an adequate basis for concluding that all the claims of immature minors were before the court, particularly in light of plaintiffs' failure to include appropriate allegations in their amended complaint. See 2 App. 472 (remarks of Julian, S.D.J.).

view, the situation is neither confusing nor demanding of speculation: under Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1979), a child or adolescent may not give legally effective consent to, say, the performance of abdominal surgery, unless he or she falls within one of the statute's six explicit categories. Moreover, a minor not within § 12F's scope, i.e., most adolescents and children in the Commonwealth, may avoid the traditional common law requirement of obtaining parental *consent* (not "consultation," as Planned Parenthood suggests at page 67 of its brief) by invoking the Commonwealth's limited mature minor rule only if a provider's notification of the child's parents would not be in his or her best interests. The Supreme Judicial Court's "literal" statement of the law in this regard in *Attorney General* needs no speculative gloss, see Planned Parenthood's brief at 67,[2] and there is certainly no support in *Attorney General* for Baird's assertion that "[a] minor who is capable of giving informed consent to medical treatment may be treated without parental consent and

[2] Planned Parenthood suggests that its speculation and preference for a requirement that physicians merely consult with a minor's parents should be accepted because the Supreme Judicial Court's comments appear under the heading of "Parental Consultation as a Requirement." Brief at 67-68. This argument should be unconvincing for two reasons. First, the heading, as the court states early in its opinion, is derived from the District Court's phrasing of its certified questions. *Attorney General* at 101, 360 N.E. 2d at 292. Second, the court itself, in reviewing the history of mature minor rules at common law in other jurisdictions, notes that the purpose of such a rule is to relax "the harshness of the rigid [common law] requirement of parental *consent* . . . [emphasis supplied]." *Attorney General* at 108, 360 N.E. 2d at 295. Therefore, it is clear that the court was aware that, absent a mature minor rule, a physician is required to obtain parental *consent*, and not simply consult with parents, prior to providing health care services to a minor. *Attorney General* at 110, 360 N.E. 2d at 296. ("We have never held or implied on common law grounds that a physician may operate on a minor, where there is no emergency, without the *consent* of at least one parent. We have indicated that such an *unauthorized* operation constitutes an intentional tort . . . [emphasis supplied; citation omitted]").

without judicial interference, except when that medical treatment is abortion or sterilization." Baird's brief at 33.[3]

As the Supreme Judicial Court states in *Attorney General*, while a limited mature minor rule exists in Massachusetts, the Legislature has determined not to permit its application to several difficult decisions, including abortion, sterilization, and, presumably, the selection of methadone maintenance as therapy for drug addiction. *Attorney General* at 111, n. 9, 360 N.E. 2d at 296, n. 9; see Brief for the Appellants at 31-32 and n. 18. Appellees often argue that this decision imposes an unjustifiable burden, is discriminatory, unreasonable, and, apparently, thus unconstitutional. See, e.g., Planned Parenthood's brief at 20. Appellants urge the Court to reject such mechanical reasoning, reasoning which would virtually deprive the Commonwealth of its traditional ability to adjust the protection which its law affords its minor citizens as circumstances change over time. In preference to the imposition of such a restriction, the Attorney General proposes that the Court simply recognize that the scope of a mature minor rule, whether a creation of the legislature or the judiciary, ought to be within the constitutional authority of the state to determine and that, as long as it does so reasonably, its judgments should be permissible.[4]

[3] Baird's brief describes § 12F's provisions properly at pages 13 and 32, but then misstates them at pages 21 and 33. Similarly, the mature minor rule is stated incorrectly at pages 32 and 33.

[4] The conclusion should be the same under "heightened" scrutiny, if the Court believes such review appropriate, because promotion of sound decision making by children and adolescents faced with the abortion decision (or that of sterilization or methadone maintenance) is a sufficiently significant state interest to justify differential legislative judgment. *See Planned Parenthood* at 102 (Stevens, J., dissenting); *cf. Carey* at 693, n. 15 (plurality opinion citing portion of Justice Stevens's dissent in *Planned Parenthood* with approval); *Maher* at 480 (state may impose different requirements affecting abortion decision under welfare program since "[other] procedures do not involve the termination of a potential human life . . .").

II. Appellees Incorrectly Rely Upon Roe v. Wade and Carey v. Population Services International to Establish Their Position that a Minor's Right to Privacy Has the Same Constitutional Dimensions as That of an Adult.

Perhaps the principal doctrinal issue in this case is the scope of a minor's right of privacy. The issue presents logical difficulties because the usual consequence of a determination that a constitutional right is "fundamental" is that state statutes which affect it are subject to strict judicial scrutiny. However, while this Court has held both that the right of privacy is fundamental and that it extends to minors, it has never held that state statutes affecting a minor's right of privacy are subject to strict scrutiny. In fact, various majorities of the Court have held precisely the opposite and approved state statutes which impinge upon a minor's fundamental right in a manner which would be impermissible were adults similarly affected. See Brief for the Appellants at 34, n. 19 (collecting examples). Decisional law thus suggests at least three analytical approaches: first, state statutes affecting the fundamental rights of minors are subject to ordinary judicial scrutiny; second, while subject to ordinary scrutiny, state statutes affecting the fundamental rights of minors may not work absolute prohibitions or impose government-mandated harm upon minors who seek to exercise their rights; and, third, a middle level of "heightened" review is appropriate. As appellants have argued previously, the statute which appellees challenge in this case is constitutional on its face under either the first or second set of standards. Brief for the Appellants at 17-33.[5]

[5] Apparently, Planned Parenthood was unable to understand the Attorney General's argument concerning the second alternative. Planned Parenthood's brief at 56, n. 56. The argument may well be incomprehensible if, as appellees do, one begs the very question to which it is directed.

The Attorney General has also argued that the statute is constitutional even if subjected to "heightened" judicial scrutiny as the Court has articulated this standard in similar cases. Appellees' arguments, on the other hand, seek to import criteria applicable to strict scrutiny analysis, or which only a plurality of the Court accepts, in order to justify their conclusion that the statute is unconstitutional. The Court should firmly reject these abuses of its cases.

Neither *Roe* v. *Wade*, 410 U.S. 113 (1973), nor *Doe* v. *Bolton*, 410 U.S. 179 (1973), involved an analysis of a state statute which, like the one at issue in this case, regulates physician conduct in order to encourage sound decision making by adolescents and children. In fact, the Court in *Roe* explicitly acknowledged that its discussion was not directed at such a question. *Roe* at 165, n. 67. Nevertheless, appellees cite both *Roe* and *Doe* as sources of constitutional standards directly applicable to this case. See, e.g., Baird's brief at 25, 31; Planned Parenthood's brief at 43, 55, 56, 62, 64, 65, 73, 77. Similarly, appellees' citations to *Carey* v. *Population Services International*, 431 U.S. 678 (1977), are improper. Despite the fact that appellants carefully point out in their brief that there *was no* opinion of the Court on the crucial question of the standard of judicial scrutiny which the Court should use to resolve the claims in that (and this) case, Brief for the Appellants at 24-26, appellees cite the plurality opinion in *Carey* as the opinion of the Court. E.g., Planned Parenthood's brief at 55 and 64; Baird's brief at 29-30. The Attorney General submits that, without such miscitations, appellees' arguments lose much of their force and do not establish that the Commonwealth's interests and the means it has chosen to advance them are constitutionally deficient. See Brief for the Appellants at 34-38. The Court should therefore conclude that the statute is constitutional.

III. The Statute's Provisions Are Amenable to Interpretation and Severance Without Violating the Principles of United States v. Raines.

Appellants have previously argued that the District Court should have either severed any unconstitutional provisions from the statute or enjoined its application to physicians in those situations in which its enforcement would transgress constitutional boundaries. Brief for the Appellants at 56-62. Appellees appear to agree that *United States* v. *Raines*, 362 U.S. 17 (1970), has severely limited *United States* v. *Reese*, 92 U.S. 214 (1875), but contend that the limited surviving exception which *Reese* provides to the *Raines* rule applies in this case. Planned Parenthood's brief at 81-85; Baird's brief at 41-44. Relying upon *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), appellees contend that the statute, if limited by enjoining its application to mature minors in the first trimester, would not give fair warning of the conduct which it forbids.

Papachristou was a case which dealt with vagrancy laws challenged on traditional void-for-vagueness grounds. *Papachristou* at 165-69. In contrast, appellees attack the statute in this case on the basis of its over-inclusiveness. See, e.g., Baird's brief at 15, 18, and 30 ("All parties admit that emotionally supportive parental involvement should be encouraged if at all possible. It is destructive, however, to the family unit for the Commonwealth to compel such involvement over the objection of physician and patient *in every case*. That is the objectionable quality of the statute in question . . . [emphasis supplied]"). Thus, assuming *arguendo* that the statute may not be constitutionally applied to physicians attending mature minors in the first trimester, an interpretation which limited its application to physicians in all other situations would still permit the statute to give intelligible warning to persons of

ordinary intelligence of the conduct which it forbids since it would apply to them on its face. Lack of intelligible warning to those subject to its requirements simply would not be a problem, and the Court should conclude that the strong principles of *Raines*, rather than the attenuated exception of *Reese*, control this case. See Brief for the Appellants at 59-62.[6]

Therefore, the District Court's order declaring the statute unconstitutional on its face and enjoining appellants from enforcing it in its entirety should be reversed.

IV. Appellees' Arguments Do Not Justify the District Court's Order Concerning Costs.

The District Court's decision and appellees' briefs are devoid of authority supporting the proposition that a lower federal court may alter an order of this Court under Rule 57

[6] Planned Parenthood's remark that this Court has always employed a facial (as opposed to an as applied) analysis in "abortion" cases, Planned Parenthood's brief at 77, is hardly an adequate response either to appellants' argument or to Justice Powell's recent observation concerning narrow, as applied injunctions in *Zablocki* v. *Redhail*, 434 U.S. 374, 401, n. 2 (1978):

> *Boddie* was an "as applied" challenge; it does not require invalidation of § 245.10 on its face. In ordinary circumstances [i.e., a statute which contains a severability clause and as to which the Legislature's intent is clear that it desires as much of the statute to be effective as is constitutionally permissible], the Court should merely require that Wisconsin permit those members of the appellee class to marry if they can demonstrate "the *bona fides* of [their] indigency," 401 U.S., at 382.

Of course, the statute in this case contains an unusually fine severability clause, and the Supreme Judicial Court has expressed the Legislature's intent that the courts construe the statute to preserve its provisions to the greatest extent possible.

concerning the division of costs on appeal. Indeed, Planned Parenthood virtually concedes that the District Court exceeded its authority, but suggests that the proper course for appellants to follow is not to appeal but rather to seek relief from judgment in the District Court under Fed. R. Civ. P. 60(b). Planned Parenthood bases its argument on an assumption, that the District Court was unaware of this Court's August 2, 1976, order concerning costs, which review of the record renders untenable.[7]

On June 7, 1977, after consulting with the Clerk of this Court, defendants filed a motion in the District Court seeking an order compelling the plaintiffs to comply with this Court's order of August 2, 1976, and reimburse defendants for the cost of their appeal.[8] Docket, June 7, 1977, 1 App. 37. On June 15, a unanimous District Court allowed defendants' motion. *Id.* While it seems that Planned Parenthood is unaware of the record on this issue, appellants submit that the District Court was not and that it entered its order fully aware of this Court's prior order under Rule 57. In such circumstances, a motion under Fed. R. Civ. P. 60(b) would be fruitless, and, in any event, appellants are entitled to seek this Court's judgment on appeal.

As an alternative basis for supporting the District Court's unprecedented order, appellees assert that appellants make "egregious" and "incorrect" statements in their brief concerning the Supreme Judicial Court's construction of the statute and have adopted arguments possessing "chameleon-like qualities." Planned Parenthood's brief at 90; Baird's brief at 44. These assertions add nothing to the District Court's ra-

[7] Planned Parenthood also assumes that appellants themselves were unaware of this order. Planned Parenthood's brief at 90. This assumption, untenable on its face, is also contradicted by the record.

[8] Plaintiffs forced defendants to file this motion by refusing to comply with the August 2, 1976, order voluntarily.

tionale and cannot, as a matter of law, justify its action.[9] They deserve a firm response, however, because they suggest that appellants have conducted their defense of the statute improperly both in the District Court and in this Court.

Constitutional adjudication is not a contest. It is not a game. And it is not, as is often the case with private litigation, merely an institutionalized method of resolving a dispute. Rather, and particularly in a case such as this, it is the means by which our society adjusts fundamental legal precepts to reflect evolving policies and values, and the abstention doctrine, as this Court re-emphasized in *Bellotti I*, is designed to aid it in performing this difficult task by precluding the consideration of constitutional challenges to state statutes when alternative interpretations are available which "would 'at least materially change the nature of the problem' that appellants claim is presented [citation omitted]." *Bellotti I* at 147. As a result of abstention and retrial, this Court now has before it a much narrower set of claims against the statute and a record much more complete than that which it considered in *Bellotti I*. Appellants submit that all parties to this litigation should be pleased that this controversy has been narrowed. Appellants also submit that the District Court unjustifiably failed to recognize the significant role which the Attorney General played in achieving this salutary result. See Brief for the Appellants at 64 and n. 37. The District Court had no authority to alter this Court's order of August 2, 1976, and appellants and the people of the Commonwealth do not deserve the punishment which it imposed. Therefore, its order purporting to alter this Court's order of August 2, 1976, should be reversed.

[9] In *Bellotti I* this Court disposed of complaints related to the invocation of the abstention doctrine, *Bellotti I* at 143, n. 10, and, of course, its order of August 2, 1976, was entered in light of its conclusions on this point.

V. This Court Should Not Consider Extra-Record Information Which Could have been Introduced as Evidence in the District Court or Which the District Court Explicitly Refused to Consider.

On April 13, 1977, in response to defendants' opposition and their Initial Statement of Disputed Material Facts, the District Court ruled that it would not proceed to consider this case on plaintiffs' motion for summary judgment and that, in the absence of stipulations, a trial would be necessary to compile an adequate record concerning several of the factual issues which defendants suggested were material. 1 App. 151-53. The District Court made its determination to try this case although most of the issues defendants brought to its attention involved "legislative" facts and although the practice of the federal courts in cases such as this has often been to consider "legislative" facts without subjecting them to the test of the trial process. *Compare Doe* v. *Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring and expressing concern over Court's use of legislative facts but concluding use did not exceed "the scope of judicial notice accepted in other contexts . . ."), *with Colautti* v. *Franklin*, U.S. , , nn. 14 & 15, 99 S. Ct. 675, 686, nn. 14 & 15 (1979) (Court relied upon testimony concerning legislative facts adduced at trial).[10] No party has appealed from this order of the District Court.

At the same time, the District Court also ruled that:

> [Disputed Facts] G and H [reproduced in the footnote],[11] particularly in light of the Supreme Judicial

[10] For a definition of "legislative" facts, see K. Davis, *Administrative Law Treatise*, § 15.03 (1958).

[11] Disputed Fact G is "In those cases in which a girl sought an abortion without parental consent, was required to consult her parents, and was re-

Court opinion, appear to the Court to raise questions of constitutionality as applied and not to present germane questions to this Court.

In other words, we rule now that we will conclusively assume for the purposes of our decision, utmost speed, diligence, and proper procedure and consideration, including protection of privacy by the Superior Court and an Appellate Court. This is a non-issue. . . .
1 App. 153.

Pursuant to this order, the District Court refused to consider evidence which Planned Parenthood proffered concerning the operation of the Massachusetts Superior Court system, and the evidentiary record contains no evidence on this question. No party has appealed from this order.

Despite these significant evidentiary rulings in the District Court, an organization of which appellee Planned Parenthood is an affiliate, Planned Parenthood Federation of America, Inc., seeks through an amicus brief [12] to enlarge the evidentiary record and have this Court consider information which, unlike that upon which the defendants relied in the District Court and rely upon in this Court on appeal, has not been subjected to the clarification and verification which the trial process provides. Moreover, Planned Parenthood Federation seeks to introduce this information without suggesting that it was unable to produce it as evidence in the District Court proceedings or that its affiliate, appellee Planned Parenthood, could not have done so on its behalf.[13] At the same time, appellee Planned Parenthood includes in its brief a chart, several statements of fact, and an argument concerning the very matters about which the District Court refused to take evidence and which it ruled a "non-issue." Planned Parenthood's brief at 47-52; 1 App. 153.

Appellants submit that the Court should not consider any of the extra-record information which either appellee Planned Parenthood or proposed amicus Planned Parenthood Federation has included in its brief. Doing so would have the effect of permitting appellees to insert in the record evidence which appellants have not had an opportunity to evaluate and to introduce new arguments, based upon disputed facts, which the District Court refused to consider and which, as a result, appellants have not thought necessary to prepare evidence to counter. At this point in these proceedings, and having failed to appeal the District Court's orders, appellee Planned Parenthood can hardly argue that fairness requires such results. On the other hand, as the deposition of Carol Nadelson, defendants' other discovery products, and the testimony adduced at trial demonstrate, opinions and findings of the type which Planned Parenthood Federation includes in its brief are controversial and often subject to qualification when tested upon cross-examination. To accept them without this safeguard, particularly when the District Court thought it unwise to do

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fused parental authorization, how quickly could she present her case to the Superior Court and obtain a decision . . . [footnote omitted]." 1 App. 132.

Disputed Fact H is "How quickly could a girl in the circumstances described in G obtain appellate review of an adverse Superior Court ruling . . . [footnote omitted]." *Id.*

[12] Appellants did not consent to the filing of this amicus brief precisely because appellee Planned Parenthood is an affiliate of Planned Parenthood Federation of America, Inc., and, presumably, is capable of making whatever proper arguments Planned Parenthood Federation has to offer.

[13] The nature of this evidence varies widely. Some of it is statistical; some of it consists of statements of opinion and belief published in the literature, both medical and legal; and some is simply collateral, i.e., used in an attempt to diminish the credibility or weight of evidence which defendants adduced at trial.

so, would be to run the risk of resting decision upon an unsure foundation.

For these reasons, then, the Court should ignore that portion of appellee Planned Parenthood's argument appearing at pages 47-52 of its brief and disregard all factual information contained in the amicus brief of Planned Parenthood Federation of America, Inc., should the Court grant its motion for leave to file.

Conclusion

> To conceal [substantive due process] inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.
> *Zablocki* v. *Redhail*, 434 U.S. 374, 396 (1978) (Stewart, J., concurring in the judgment).

The evidence in this case establishes, and all parties agree, that "emotionally supportive parental involvement should be encouraged if at all possible . . ." to assist a pregnant adolescent or child with the difficult task of deciding whether to undergo abortion surgery. 2 App. 37-38; 104-05; 139; 390; 539-42; 579; Baird's brief at 15; Planned Parenthood's brief at 28, n. 22. The evidence also establishes that the statute is consistent with the best interests of the vast majority of pregnant adolescents and children whom physicians may attend. 2 App. 343-45; 541-42; see chart addendum to Brief for the

Appellants at 67; *see* Planned Parenthood's brief at 12 (accepting District Court's finding that "most parents probably are supportive . . ."). In addition, the evidence establishes that immature minors are incapable of consenting to the performance of abortion surgery, that a large number of abortions are performed on such children, and that, prior to a physician's performing surgery on an immature minor, "a valid consent by someone is required. . . ."[14] *Baird III* at 1001; 1 App. 157-59; 207-13; 515-16; Planned Parenthood's brief at 12, n. 11. Finally, the evidence establishes that the ethical problems which health care professionals face in providing services to pregnant adolescents and children are substantial and that agreeing to withhold information about pregnancy and abortion from a child's parents can create significant professional dilemmas. 2 App. 446-52.

At the same time, appellants acknowledge, as they have consistently, that the statute reflects "'legislative recognition of the unfortunate fact that parents are not always supportive of their pregnant daughters and may, the evidence suggests infrequently, refuse to consent to the performance of abortion surgery although the surgery is in their child's best interests, or mistreat her in other ways.'" *Baird III* at 1002. It is for this reason that the Massachusetts statute, unlike that which this Court considered in *Planned Parenthood*, includes a provision for judicial superintendence of the family decision making process.

Should this Court pull from the loom with a sweeping hand a cloth which the Commonwealth's Legislature and its Supreme Judicial Court have so carefully woven? Is it the function of substantive due process to tear apart a legislative

[14] Although Planned Parenthood recognizes this requirement in its brief, it is hard to understand who this "someone" might be and how room for such a fine judgment could be found in the Constitution were appellees' broad theories of a minor's right of privacy accepted.

judgment so delicate in its fabric and intricate in its detail? Appellants suggest not. As Justice Stewart observes, it is an "extreme power" which can work such alterations in the "process of representative democracy in one of the sovereign States of the Union . . .," and the Attorney General submits that this case does not warrant its use.

For the significant reasons previously discussed, appellants have argued that this Court should consider the statute constitutional on its face. In doing so, it might acknowledge the limits of substantive due process adjudication and point out that fine judgments concerning the exactly proper relationship between parents, their children, and the state are much more amenable to the legislative than the judicial hand. The eye of ordinary — or "heightened" — scrutiny simply cannot look as closely at or work as carefully with the intricate social threads which the Massachusetts Legislature has woven together in the statute as can the peoples' elected representatives.

Requiring recognition of the limits of substantive due process and facial attacks would not, however, entail acceptance of any constitutional infirmity which the Court may perceive in the statute's potential application to certain situations. For, as appellants suggested to the District Court, an established method, the "as applied" attack, exists to vindicate the constitutional rights of individuals or classes of persons impermissibly affected by a statute valid on its face. See, e.g., *Zablocki* v. *Redhail*, 434 U.S. 374, 401, n. 2 (1978) (Powell, J., concurring in the judgment) (making distinction and suggesting that as applied remedy should be provided in "ordinary circumstances," even in case involving fundamental right); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973) (rejecting facial challenge in First Amendment area); *Boddie* v. *Connecticut*, 401 U.S.

371 (1971) (an as applied attack on behalf of indigents). "Extreme power," as any other, benefits from conservation.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

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